petitioner successfully contending that that notice of 1960 was void as it was not preceded by a fresh section 4 notification.

Vishnu Prasad demonstrates how a section 4 notice can be exhausted and how a section 8 notification may be void.

In my judgment in the instant case the delay of almost 6 years between the section 8 notification and the holding of the section 10 enquiry caused the section 8 notice to be exhausted and of no effect, for the valuation of the land made in 1981, based on the date of the section 8 notification would not provide adequate compensation to the applicants. Accordingly, the award of the Collector is hereby called in and quashed. I also order that the Applicants shall be entitled to the costs of and incidental to the application and to the preliminary objection as taxed by the proper officer of this Court.

Appeal allowed.

Solicitors: *Presgrave & Matthews.*

TAN SUAN CHOO v. MAJLIS PERBANDARAN PULAU PINANG

[O.C.J. (Edgar Joseph Jr. J.) October 16, 23 & 25, 1982]
[Penang – Civil Suit No. 445 of 1982]

Practice & Procedure – Interlocutory injunction against municipality – Preliminary objections overruled – Specific Relief Act 1950, s.54(d) not applicable to temporary injunctions.

Practice & Procedure – Injunction against municipality – Question of balance of convenience – Public interest prevails – Injunction refused.

On May 23, 1980 the plaintiff was granted a licence by the Ministry of Trade and Industry to carry on the business of liquified petroleum gas at premises No. 8 Cangkat Minden, Lorong 9, Penang. On November 3, 1981, the Jabatan Perkhidmatan Bomba, Penang, required the plaintiff to comply with various conditions, which she did, and in consequence whereof she incurred considerable expense. On March 8, 1982, the Jabatan Perkhidmatan Bomba issued to the plaintiff a licence which authorized her to carry on business at the said premises. On April 7, 1982, the Jabatan Perkhidmatan Bomba Pulau Pinang wrote to the plaintiff stating that her licence had been cancelled on the directions of the defendants.

The defendants served a notice to the plaintiff to cease using the premises as a place for the storage and sale of gas and to remove all gas cylinders, and required the plaintiff to vacate the premises within 30 days failing which the defendants might enter the said premises and remove any person or property found therein.

The plaintiff sought for an interlocutory injunction restraining the defendants from demolishing their premises at No. 8 Cangkat Minden, Lorong 9, Penang or causing the removal of all of any of the gas cylinders therein. The defendants raised a preliminary objection that the application should be dismissed *in limine* as it was barred by the provisions of the Specific Relief Act, 1950, section 54(d).

Held: (1) section 54 of The Specific Relief Act, 1950, applies to applications for perpetual injunctions. It has no relevance to applications for a temporary injunction as in the instant case; there is nothing in the Rules of the High Court 1980 which constitutes a bar to the granting of an interim injunction against a municipality. The defendants' preliminary objections were therefor overruled;

(2) the plaintiff having had her licence cancelled by the appropriate authority was in fact engaging in an illegal activity by continuing to store and sell gas cylinders and, on this ground alone, would most probably fail at the trial in which the sole relief she was asking for was a permanent injunction;

(3) though the plaintiff has incurred substantial expenses in complying with the conditions inposed by the Jabatan Perkhidmatan Bomba Pulau Pinang, and the defendants had been aware of her intention to engage in the trade concerned on the said premises right from the start, on the question of balance of convenience, the court regarded the wider public interest of ensuring the safety of adjoining houses and their occupants as decisive. The plaintiff's application was thereafter dismissed.

Cases referred to:

(1) *Trendtex Corpn.* v. *Central Bank of Nigeria* [1977] 1 All E.R. 881
(2) *Barclays Bank* v. *I.R.C.* [1961] A.C. 509.
(3) *Raja Ram* v. *State of Uttar Pradesh A.I.R.* 1963 All 449.
(4) *Mohamed Shafi* v. *Sialkot Municipality & Anor.* A.I.R. 1940 Lah. 451.
(5) *Municipal Committee, Sialkot* v. *Jagat Singh* A.I.R. 1936 Lah. 572.
(6) *Municipal Board, Manglaur* v. *M. Maharaj* A.I.R. 1965 S.C. 1147.
(7) *Quinn* v. *Leathem* [1901] A.C. 495, 506.
(8) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504.
(9) *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411.
(10) *Rousell-UCLAF* v. *G.D. Searle & Co.* [1977] F.S.P.R. 125; *The Times* October 22, 1977.

CIVIL SUIT.

Karpal Singh for the applicant/plaintiff.
N. Chandran for the respondent/defendants.

Cur. Adv. Vult.

Edgar Joseph Jr.: At all material times to this suit the Plaintiff is and was the owner of premises known as No. 8, Cangkat Minden Lorong 9, Pulau Pinang.

The Defendants are the Majlis Perbandaran Pulau Pinang, a Local Authority within the meaning of section 2 of The Local Government Act, 1976 (Act 171).

In this application by Summons-in-Chambers supported by affidavit the Plaintiff is asking for an interim or interlocutory injunction restraining the Defendants, the Majlis Perbandaran Pulau Pinang, by themselves, their servants and/or agents or otherwise howsoever from doing the following acts or any of them, that is to say, demolishing the erected premises or any part thereof which stands at Lot Nos. 2807 Mk. 13, D.T.L Penang on which land stands a building bearing No. 8, Cangkat Minden Lorong 9, Penang or causing the removal from the said premises of all or any of the gas cylinders therein or to cause trespass and/or nuisance and/or damages to the plaintiff pending hearing and finalisation of the suit herein.

On the hearing of the application before me in Open Court Mr. N. Chandran for the Defendants raised a preliminary objection that the application should be dismissed *in limine* as it was barred by the provisions of section 54(d) of The Specific Relief Act, 1950 (Revised 1974) which reads:

"54. An injunction cannot be granted –

(d) to interfere with the public duties of any department of any Government of Malaysia, or with the sovereign acts of a foreign Government;"

In my view the preliminary objection should be overruled on two separate grounds:

In the first place, in my view, section 54 of the Specific Relief Act, 1950 applies only to applications for perpetual injunctions. It has no relevance to applications for a temporary injunction as in the instant case. This is clear from a reading of Chapters IX and X of the Act which are entitled "of injunctions generally" and "of perpetual injunctions" respectively. Section 54 (d) relied on by Mr. Chandran falls under Chapter X which deals exclusively with perpetual injunctions. Next, section 51(1) which falls under Chapter IX states categorically that "temporary injunctions may be granted for any period of a suit and are regulated by the law relating to civil procedure." This, in my view, makes the Rules of the High Court 1980, applicable and there is nothing therein which constitutes a bar to the granting of an interim injunction against a municipality. I also notice that at pg. 909 of *Pollock & Mulla* on the Indian Contract & Specific Relief Acts, Eighth Edition, there appears the following short sentence in the commentary entitled "Scope of the Section" on section 56 of the Indian Act which is generally *in pari materia* with section 54 of our Act: "This section gives a list of cases in which a *perpetual* injunction cannot be granted." (The emphasis is mine)

Before passing to my next ground for over ruling the preliminary objection I should perhaps mention that the point about section 54(d) having application to perpetual injunctions only was raised by me in the course of the argument and both counsel were of the view that it applied to temporary injunctions as well. With respect, for the reasons given, I cannot agree.

I now pass on to the second and more substantial ground for dismissing the preliminary objection.

I do not consider that the Defendants although undoubtedly a Local Authority within the meaning of section 2 of The Local Government Act, 1976 (Act 171) come within the scope of the words "any department of any Government of Malaysia ..." which phrase I understand to mean the Government of any State or the Government of Malaysia or any department thereof.

In arriving at this conclusion I have taken into consideration matters relating to the functions and control of the Defendants. I have asked myself whether the Defendants are under government control and exercised government functions. This is the approach Lord Denning, M.R., adopted in *Trendtex Corpn.* v. *Central Bank of Nigeria*[1] (a case not cited to this court) when he had to decide the question whether a plea of sovereign immunity which is available to a foreign sovereign state or its department could be successfully invoked.

The following passage in his judgment is relevant:–

"I confess that I can think of no satisfactory test except that of looking to the functions and control of the organi-

sation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised government functions. That is the way in which we looked at it in *Mellenger* v. *New Brunswick Corpn:*

'[The corporation] has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does .. "

I accordingly turn to consider certain provisions of the relevant statute under which the Majlis Perbandaran Pulau Pinang was set up. By Penang P.U. 73/76 dated December 13, 1976, The Local Government Act, 1976 (Act 171) (which for brevity and convenience I shall refer to as 'the Act') came into force in the State of Penang on December 15, 1976. By section 13 of the Act, local authorities shall be corporations sole with perpetual succession and a common seal and may sue and be sued and can acquire, hold and sell property. Then power is given to Local Authorities to make rules for the purpose of making and maintaining good conduct and discipline among officers and employees (sections 16 to 18). It would appear, therefore, that Chap. D entitled "Public Officers (Conduct and Discipline) (Chapter D) General Orders, 1980," which applies to Government officers has no application to officers and employees of Local Authorities.

Next, we find that provision is made for a Superannuation or Provident Fund (section 18). There appears no provision for pensions such as we have for Government officers. Part IV contains sections 19 to 38 which deal with conduct of business of Local Authorities. Part V contains sections 39 to 52 which are general financial provisions. All moneys received by the Local Authority are constituted a fund called the Local Authority Fund and shall together with all property become vested in the Local Authority and be under the control and direction of the Local Authority (section 40(1)). All orders or cheques against the Fund shall be signed by two officers authorised in writing by the Local Authority (section 40(3)). However, moneys may only be invested in securities in which trustees may invest or in such other manner as authorised by the Minister of Finance (section 40(4)). Clearly, therefore, Local Authorities enjoy a considerable degree of financial autonomy. Part VI of the Act deals with the auditing of accounts. Then Part XIV contains certain miscellaneous provisions two of which are worth mentioning: one provides that the Public Authorities Protection Ordinance, 1948, applies to any suit against a public authority (section 124) and the other that its employees and officers shall be deemed public servants within the meaning of section 21 of the Penal Code (section 126). Now the word "deemed" in a statute sometimes has an artificial connotation which would not otherwise apply. As Viscount Simonds said in *Barclays Bank* v. *I.R.C.*[2]:

"I ... regard its primary function as to bring in something which would otherwise be excluded."

My conclusion from an examination of the above provisions of the Act is that Local Authorities are significantly free from government control and do not exercise government functions.

Lastly, Mr. Karpal Singh for the Plaintiff referred me to a number of cases decided in India which show that permanent injunctions have been granted against municipalities notwithstanding section 56(d) of the Indian Specific Relief Act, 1877, which is equivalent to our section 54(d). Examples of these are: *Raja Ram* v. *State of Uttar Pradesh*[3]; *Mohd. Shafi* v. *Sialkot Municipality & Anor.*[4]; *Municipal Committee, Sialkot* v. *Jagat Singh*[5]; *Municipal Board, Manglaur* v. *M. Maharaj*[6]. I appreciate, however, that in none of these cases was the point taken that a municipality is not a department of Government and it appears to have been accepted by the parties that the ban contained in section 56(d) had no application. These cases are not therefore to be taken as authorities for the proposition that municipalities are not a department of Government. As Lord Halsbury said in *Quinn* v. *Leathem*[7] ".. a case is only an authority for what is actually decides."

In view of the above conclusions, it is unnecessary at this stage to consider the various other arguments revolving round the question whether the impugned acts of the Defendants in this case, namely, the issue of the notices under section 72 of the Street, Drainage & Building Act, 1974, were performed in discharge of their "public duties" within the meaning of section 54(d) of the Specific Relief Act, 1950. This question can, perhaps, be considered when the application falls to be determined on its merits.

I am now prepared to hear arguments as to the merits of the application.

Edgar Joseph Jr. J.: Having given my ruling the day before yesterday dismissing the Defendants' preliminary objection that the Plaintiff's application for an interim or interlocutory injunction was barred by reason of the provisions of section 54(d) of The Specific Relief Act, 1950, I now proceed to consider the application on its merits.

The essential facts which are not in dispute may be culled from the affidavits affirmed to by the Plaintiff and the Respondents' Building Inspector, Mr. Chua Thian Lye on September 13, 1982 and on October 5, 1982 respectively.

On or about May 23, 1980, the Plaintiff was granted a licence by the Ministry of Trade and Industry to conduct and carry on the business of selling and/or supplying liquified petroleum gas at premises No: 8, Cangkat Minden, Lorong 9, Pulau Pinang (hereinafter referred to as 'the said premises') by virtue of the provisions of the Control of Supplies Regulations, 1974, being Exh: P1, which was put in by counsel by consent upon my suggestion.

On or about November 3, 1981, the Jabatan Perkhidmatan Bomba, Pulau Pinang, required the Plaintiff to comply with various conditions, which she did, and in consequence whereof she incurred considerable expense.

On or about March 8, 1982, the Jabatan Perkhidmatan Bomba, Pulau Pinang, issued to the Plaintiff a licence by virtue of the provisions of sections 58 and 221 of the Undang-undang Perbandaran (Bab 133) being Exh: P2, which authorised her to carry on business at the said premises.

However, on or about April 7, 1982, the Jabatan Perkhidmatan Bomba Pulau Pinang wrote to the Plaintiff saying her licence, P2, had been cancelled on the directions of the Defendants. I pause to comment that the validity of this cancellation has never been questioned by the Plaintiff.

Then the Defendants issued and caused to be served a "Notice to do an act" under the provisions of section 72 of the Street, Drainage & Building Act, 1974, addressed to one Khoo Kooi Kheak (whose identity has not been established) wherein it was alleged that the said premises which had originally been erected as a dwelling house had been converted into a place for the storage and sale of gas in contravention of section 70 of the Street, Drainage & Building Act, 1974, requiring him to cease using the place as such and to remove all gas cylinders. This notice is Exh: C.T.L. 2.

Next, the Defendants caused to be issued and served on the Plaintiff a notice dated July 8, 1982, which although entitled "Notice before Demolition" only required her to cease using the said premises as a place for the storage and sale of gas and to remove all gas cylinders. The notice went on to say that failing compliance within thirty days, the Defendants intended to enter upon the said premises and do all acts required therein. Lastly, it categorically stated that the Defendants in exercise of its powers under section 72(6) of the Street, Drainage & Building Act, 1974, required the Plaintiff to vacate the said premises within thirty days failing which the Defendants might enter the said premises and remove any person or movable property found therein. This notice is Exh: C.T.L. 3.

As a result, the Plaintiff consulted her solicitors, the upshot of which was the issue of a writ against the Defendants claiming a permanent injunction, in effect, to restrain them from carrying out their threats contained in C.T.L. 3.

Then followed the present application for an interim injunction which is expressed in virtually the same terms as the injunction sought for in the writ except, of course, that it is expressed to endure until the finalization of the suit.

The substantial paragraph in the Plaintiff's affidavit is paragraph 10 which contains the following averments:—

> "I am advised and verily believe the action under the abovenamed provisions are *ultra vires* in that:—
>
> (a) The said Act does not empower the defendants to require me from ceasing to use the abovementioned premises as a place for storage and sale of gas and/or to remove all gas cylinders therein.
>
> (b) The abovementioned premises were not erected within section 70(16)(e) of the said Act and such could not be demolished pursuant to section 72 of the said Act.
>
> (c) The defendants' notice, date 28th day of July 1982, states that a notice was served to the owner on the 25th day of June, 1982. No such notice was ever served on the owner of the land known as Lot Nos. 2807, MK. 13, D.T.L., Penang."

It is, in my view, unnecessary to refer to the contents of the affidavit of the Defendants' Build-

ing Inspector, Encik Chua Thian Lye, except to mention that it joins issue with the Plaintiff upon her averments as aforesaid and adds that the Defendants are very apprehensive of the danger posed by the storage of the gas in the said premises which is a risk to adjoining properties and the residents occupying the same.

Before proceeding to express any views upon what I consider are the relevant issues raised in this applications, I would make the preliminary observation that judging from the affidavit evidence and the submissions of counsel there appears no dispute as regards the material facts though there is with regard to certain questions of law. In my view, however, this application can be determined without deciding these questions of law as I shall presently attempt to demonstrate.

The problem with which the Plaintiff is faced is that in order to entitle herself to an interlocutory injunction she must first of all show that there is at least a serious question to be tried (*American Cyanamid Co.* v. *Ethicon Ltd.*)[8] or, perhaps, go further and show that she has a real prospect of succeeding in her claim for a permanent injunction since the Defendants here are a Local Authority. This latter requirement finds support in the views of Lord Denning, M.R., in *Smith* v. *Inner London Education Authority*[9]. What his Lordship said was this (p.418 para):

"Lastly, a word about *American Cyanamid Co.* v. *Ethicon Ltd.* which we have so often. Counsel for the authority said that it should be confined to actions between parties in private law; and should not be extended to cases against local authorities in public law. I see some merit in this suggestion, especially in view of *F Hoffmann-La Roche & Co AG* v. *Secretary of State for Trade and Industry;* and also when one is considering the respective compensation in damages. But without going into detail, I am of opinion that a local authority should not be restrained, even by an interlocutory injunction, from exercising its statutory powers or doing its duty towards the public at large, unless the plaintiff shows that he has a 'real prospect of succeeding in his claim for a permanent injunction at the trial'. In this case I fear that I see no real prospect of the parents succeeding at the trial. To grant an interlocutory injunction in the circumstances would do more harm than good. It would only put off the evil day for a year."

Another member of the Court, namely, Brown, L.J., whilst expressing disagreement on this point made the concession:

"I cannot agree that on this part of the case the nature of the defendant makes any difference though it may be important when one comes to the balance of convenience."

In my view, whichever requirement is applied – the *American Cyanamid's* requirement "of a serious question to be raised" or the *Smith* requirement of "a real prospect of succeeding" – the result would be the same because the Plaintiff having had her licence, P2, cancelled by the appropriate authority is in fact engaging in an illegal activity by continuing to store and sell gas cylinders and, on this ground alone, will most probably fail at the trial in which the sole relief she is asking for is a permanent injunction. In point of fact, during the argument, I had occasion to interrupt Mr. Karpal Singh and ask him if he had any answer to this part of the Defendants' case and he candidly conceded he was in a difficulty here. With respect, I fail to see how a court would restrain the Defendants who are a Local Authority from carrying out their statutory duty the result of which is to interfere with her illegal trading activities. It makes no difference that the notice, C.T.L.3 may be invalid. The remedy of injunction is a form of equitable relief and the maxim is that he who comes into Equity must come with clean hands.

On two further grounds also the Plaintiff cannot succeed.

Even assuming there is a serious question to be tried or that she has a real prospect of succeeding she must also show that damages would not be an adequate remedy. She has not however made even an attempt to do so.

Then again, assuming she had been able to satisfy this requirement as to damages by showing that there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both, the question of balance of convenience would arise (*American Cyanamid* at page 408E). On this question, it will be recalled that the Defendants' Building Inspector had deposed in his affidavit – and this was neither challenged nor contradicted by the Plaintiff – that the storage of the gas on the said premises was a risk to adjoining houses and their occupants. In this connection, it is apposite to quote what Browne, L.J., said in the *Smith Case* cited above, at page 422, paras g & h:

"... but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*."

It is true that the Plaintiff in complying with the conditions imposed by the Jabatan Perkhidmatan Bomba Pulau Pinang had incurred substantial expenses and the Defendants have been aware of her intention to engage in the trade concerned on the said premises right from the start. Mr. Karpal Singh stressed this aspect of the case. However, assuming it were necessary to decide this question of balance of convenience I would regard the wide public interest of ensuring the safety of adjoining houses and their occupants as decisive. The case of *Roussell-UCLAF* v. *G.D. Searle & Co.*[10] supports this view. In that case the plaintiff alleged that a drug marketed by the defendant infringed the plaintiff's patent. The defendants replied that the drug had life-saving qualities and it was greatly in the public interest not to restrain the sales at the interlocutory stage. The injunction was refused.

Whether or not the Plaintiff would be entitled to damages is a question which does not arise in these proceedings and I express no opinion upon it.

For the reasons stated, I would dismiss this application with costs.

Application dismissed.

Solicitors: *Karpal Singh & Co.; Presgrave & Matthews.*

THE "MELANIE"
W.N. MAZZAROL v. UNITED ORIENTAL ASSURANCE SDN. BHD., KUANTAN

[O.C.J. (George J.) October, 1982]

[Kuantan – Civil Suit No. 58 of 1978]

Insurance – Insurance of vessel – Vessel grounded at sandbar at mouth of Kuantan River – Alleged failure to disclose fact that vessel had previously been grounded – Information given to agent of insurance company – Whether grounding a peril insured against – Whether there was total loss of vessel – Whether vessel was seaworthy – Plaintiff alleged to be incompetent or not qualified to navigate the vessel in area where she hit the sand bank – Want of due diligence.

Shipping Law – Marine Insurance – Insurance of vessel – Whether grounding a peril insured against

In this case the plaintiff was the owner of a vessel which he used as a pleasure yacht. He had sailed the vessel from South Australia to Singapore and from there to the East Coast of Peninsular Malaysia. He had anchored the vessel about 500 yards south of the river mouth but in the night the sea dragged the anchor and the vessel was left grounded. He subsequently managed to pull the vessel clear. Later he insured the vessel with the defendants, through an agent of the defendants. He had told the agent of the earlier grounding but this was not stated in the application. The vessel was taken out to sea by the plaintiff and when returning into the river the vessel came into contact with the sandbar at the mouth of the river and was grounded. The vessel could not be salvaged. The plaintiff claimed the insured sum of $50,000. The defendant company denied the claim on the following grounds:

(a) In seeking the cover there was failure to disclose the vessel had been grounded or beached on or about November 20, 1977 and thereby the defendant company was entitled to avoid the policy;

(b) The grounding of the vessel on the sandbar on December 30, 1977 was not a peril insured against;

(c) there was neither actual total loss nor constructive total loss;

(d) even if there was such a loss it was caused by the vessel being unseaworthy in that the plaintiff was not competent or qualified to navigate the vessel in the area where she hit the sand bank.

In any event the accident was caused by want of due diligence on the part of the plaintiff that entitled the defendants to deny the claim.

Held: (1) on the basis of the format of the defendant's proposal form given to the plaintiff to complete and the fact that the plaintiff had informed the agent of the earlier incident of grounding, there was neither misrepresentation made to the company nor concealment of material facts and the statement and particulars given by the plaintiff in the proposal form were true and as complete as required by the company. There was therefore no non-disclosure that entitled the defendant to avoid the policy;

(2) in this case the vessel coming into contact with the sandbar and thereafter being pushed by the wave further up the bar where she was stranded was a peril of the sea and was covered by the policy;

(3) in the circumstances obtaining in Kuantan in January 1978 a prudent uninsured owner would have done exactly what the plaintiff did and would have abandoned the stranded vessel. Accordingly for all practical purposes the vessel was a total loss;

(4) there was no want of diligence on the part of the plaintiff that entitled the defendants to avoid the claim. The accident could have happened even to the Port Pilot simply because the position of the sand bar was not static. The argument that the plaintiff's lack of knowledge of the channels was such that his taking out the vessel rendered it unseaworthy had no merit;

(5) judgment should be given for the plaintiff in the sum of $50,000 with interest.

Cases referred to:

(1) *Ayrey* v. *British Legal and United Provident Assurance Co.* [1918] 1 K.B. 136, 141.